YUNLEY ENTERPRISE SDN BHD

v.

LOH SENG LEE

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM J
[ORIGINATING SUMMONS NO: 24-1063-2005]
20 FEBRUARY 2009

LAND LAW: *Caveat - Cancellation and/or removal, application for - Land auctioned off to successful plaintiff bidder - Defendant/registered proprietor lodged private caveat disputing debt to bank and obtained injunction against foreclosure - Whether defendant having caveatable interest*

The plaintiff was the successful bidder at a public auction of the defendant's two pieces of land ('the lands') at a price of RM1,352,000. The plaintiff paid a deposit of 10% in the sum of RM135,200 to the Land Administrator ('LA') and obtained a bank loan to finance the balance purchase price. The defendant entered a private caveat disputing its debt to Malayan Banking Bhd ('the bank') to obtain the order for sale against the lands. The defendant also obtained an injunction to restrain the bank from taking any action to foreclose the lands on the same day the lands were auctioned off to the plaintiff. That apart, the defendant had also managed to set aside the summary judgment the bank had obtained against the defendant that had led to the order for sale of the lands. The plaintiff in these proceedings applied to remove and/or cancel the private caveat. The defendant contended that the injunction bound the plaintiff and challenged the validity of the foreclosure proceedings before the LA and the order for sale.

Held (allowing the plaintiff's application):

(1) The plaintiff was an "aggrieved person" under s. 327(1) NLC. A contract comes into being when the hammer comes down during a sale by public auction. The plaintiff, having successfully bid at the public auction, having paid the 10% deposit of the auction price and having duly executed the contract of sale, had a right or interest in the lands. The plaintiff would suffer loss if the private caveat was not removed. The caveat had wrongfully affected the plaintiff's right and interest in the lands. (para 28)

(2) As the successful purchaser at the auction, the plaintiff was legally entitled to obtain a loan to pay off the remaining 90% of the auction price in order to complete the contract of sale whereupon he would be entitled to a certificate of sale of the lands. The existence of a private caveat would frustrate his prospects of obtaining the loan, completing the sale and purchase of the lands and ultimately impede the registration of the sale of the lands to the plaintiff. (para 29)

(3) The defendant could not enter a private caveat on its own lands because it had no caveatable interest in the lands. It failed to establish to the satisfaction of the court that there existed a set of circumstances over and above that of its status as a registered proprietor. (para 30)

(4) The fact that the defendant was successful in its application to set aside the summary judgment which the bank instituted against it to recover the alleged debt, that the action had since been set down for full trial and that it was also successful in obtaining the injunction against the bank and that it had filed an originating summons against the bank and the plaintiff seeking the declaratory relief, could not be considered as circumstances over and above its status as a registered proprietor which gave rise to a distinct interest in the lands entitling the defendant to lodge the private caveat. (para 31)

(5) The injunction was an interim *ex parte* injunction directed at the bank. Neither the plaintiff nor the LA was made a party to the injunction. (para 33)

(6) There was no proof that the injunction was obtained and served on the plaintiff and the LA before the public auction was carried out the same day. Therefore, the injunction could not bind the plaintiff or the LA. Being an *ex parte* injunction, it would automatically lapse 21 days after the date of its issue under the Rules of the High Court 1980. Thereafter, the learned judge who granted it could grant an *ad interim* injunction pending the *inter partes* hearing of the application for the *ex parte* injunction. However, the defendant failed to satisfy the court that it had been granted an ad interim injunction pending the hearing of the *inter partes* application. That proved fatal to the defendant's resistance to the plaintiff's application in the present proceedings. Even if the

defendant had been successful in doing all of that, the court would still have ruled against the defendant because an injunction, being an equitable remedy, acted only *in personam* and not *in rem*. (paras 35 & 36) A

(7) The order for sale was granted by the LA in foreclosure proceedings that were carried out in accordance with the provisions of s. 263 NLC. The said order bound the lands. The defendant ought to have appealed against it and have it set aside by raising a cause to the contrary. (paras 36 & 38) B

(8) The LA had no powers to adjudicate on issues which might ordinarily be heard by a court. He was not a court within the definition of the word as contained in s. 5 NLC. Upon being satisfied that the charge was registered, the only question for him to decide was whether there had been a default in the payments provided for. If he was so satisfied, he was obliged to make an order for sale. (para 40) C D

(9) The appeal period for the filing of an appeal against the order for sale had lapsed. Therefore, the defendant's originating summons against the bank and the plaintiff for declaratory relief would also be futile because the Federal Court had decided that where Parliament had by plain and unambiguous language in s. 418 NLC enacted a special procedure for the enforcement of a right and for obtaining a remedy within a time-limit, that time-limit was the foundation of the right given in that section and the party who was seeking relief against the error committed by the relevant authority in the interpretation of a section in the NLC could not enforce his statutory right by a method *viz*. seeking a declaration other than that prescribed by the code creating it. (para 41) E F

(10) The defendant's remedy lies in the institution of a separate action for damages against the bank for having allowed the lands to be sold at a gross undervalue, assuming that it succeeded in proving its allegation to that effect. (para 42) G

Case(s) referred to: H

Affin Bank Bhd v. Dato' Mohamed Embong [2002] 1 CLJ 202 HC ***(refd)***

Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109 HC ***(refd)***

BSN Commercial Bank (Malaysia) Bhd v. Thomas Selvaraj Soosai [1998] 4 CLJ Supp 97 HC ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 7 CLJ 353 HC ***(refd)*** I

Development & Commercial Bank Bhd v. Government of Malaysia & Ors [1989] 2 CLJ 1205; [1989] 1 CLJ (Rep) 486 HC ***(refd)***

A *Gan Jye v. Yap Hong Chiang [2002] 3 MLJ 628* ***(refd)***
Koperasi Serbaguna Cuepacs Tanggungan Bhd v. City Investment Sdn Bhd [1982] CLJ 428; [1982] CLJ (Rep) 494 HC ***(refd)***
Labtec Sdn Bhd v. Resilient Construction Sdn Bhd [1992] 4 CLJ 2147; [1992] 2 CLJ (Rep) 682 HC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
B *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA* ***(refd)***
United Malayan Banking Corp Bhd v. Development & Commercial Bank Ltd Bhd [1983] 1 CLJ 82; [1983] CLJ (Rep) 421 FC ***(refd)***
Wee Huay Fong v. Pentadbir Tanah, Klang & Anor [2002] 6 CLJ 512 HC ***(refd)***
C

Legislation referred to:
National Land Code, ss. 5, 263(1), 327(1), 329(2), 418

For the applicant/appellant - Vinod Kamalanathan; M/s Vinod Kamalanathan & Assocs
D *For the respondent - SC Tan; M/s Cheong Wai Meng & Van Buerle*

Reported by Usha Thiagarajah

E

JUDGMENT

Su Geok Yiam J:

[1] This is an application by the plaintiff *vide* an originating summons filed on 14 July 2005, encl. (1), seeking an order from
F the court for the cancellation and/or removal by the Registrar of Land Titles of a private caveat No. 518/2005 ("the private caveat") entered by the defendant on 27 May 2005 on the title of 2 pieces of lands registered in the name of the defendant known as Lot Nos. 686 and 694 Geran Mukim Nos. 571 and 572, Mukim 1,
G Daerah Seberang Perai Selatan, Pulau Pinang (the "said lands").

[2] It is supported by the affidavit of the plaintiff affirmed on 13 July 2005 and filed on 14 July 2005, encl. (2).

[3] On 17 August 2005 the defendant through its director, Koh
H Kien Hong, affirmed an affidavit in reply, encl. (5), filed on 19 August 2005.

[4] On 19 August 2005 the plaintiff affirmed an affidavit-in-reply filed on the same date, encl. (6).

I **[5]** On 22 August 2005 the court heard the application and granted order-in-terms of the plaintiff's application (the "said decision").

[6] The defendant is dissatisfied with the said decision and has filed a notice of appeal to the Court of Appeal.

[7] Below are the reasons why the court made the said decision.

[8] The learned counsel for the plaintiff has posed five issues for the determination of the court.

[9] The five issues are as follows:

1. whether the plaintiff is an aggrieved person under s. 327(1) of the National Land Code 1965 (the "NLC")?
2. whether the defendant can enter the private caveat against the said lands and whether the defendant has a "caveatable interest"?
3. whether the injunction exhibited in encl. (5) as exh. "KKH3", binds the plaintiff?
4. what remedy is open to the defendant where the reserved price of the said lands is set very low at the public auction compared to the market value of the said lands?
5. whether the defendant can raise any cause to the contrary in these proceedings?

[10] The facts are, briefly, as follows:

[11] In consideration of credit facilities granted by the Pacific Bank Berhad, now known as Malayan Banking Berhad (the "bank") to the defendant *vide* its letter of offer dated 7 September 1996 to the defendant, the defendant charged certain lands including the said lands under two separate charges bearing Bil. Perserahan 1922/96 and 1923/96 to the bank by way of security.

[12] Subsequently upon the default by the defendant on the repayment of the credit facilities the bank commenced an action against the defendant and two others including one of its directors, Koh Kien Hong, in the Kuala Lumpur High Court *vide* GS No. D2-22-158-1998.

[13] On 3 August 1999 the learned Senior Assistant Registrar (SAR) granted summary judgment in favour of the bank and against the defendant. The defendant appealed to the judge in chambers. On 15 April 2005 the appeal was allowed and the summary judgment was set aside. The action was then set down for full trial.

[14] Meanwhile the bank instituted foreclosure proceedings against the defendant. On 4 April 2005 an order for sale of the said lands was granted by the Land Administrator, Daerah Seberang Perai Selatan.

[15] On 13 May 2005 the plaintiff was successful in his bid of RM1,352,000 during the public auction of the said lands. The plaintiff paid a deposit of 10% to the land administrator leaving a balance sum of RM1,216,800 which he must pay within a period of 120 days from the date of the auction ie, on or before 10 September 2005 failing which the deposit of RM135,200 will be forfeited by the chargee bank. The plaintiff has also duly executed the contract of sale. The plaintiff further obtained a fixed loan of RM1,150,000 from United Overseas Bank (Malaysia) Bhd to finance his purchase of the said lands.

[16] However, on 27 May 2005 the defendant caused to be entered the private caveat on the said lands.

[17] The defendant has disputed the alleged debt relied upon by the bank in order to obtain the order for sale of the said lands. In order to prevent the said lands from being foreclosed the defendant filed an application in the Kuala Lumpur High Court *vide* GS No. D2-22-158-1998 seeking an injunction to, *inter alia*, restrain the bank from taking any action to foreclose the said lands or towards the execution of any order made for the auction of the said lands.

[18] According to the defendant on 13 May 2005 the learned judge in the Kuala Lumpur High Court action granted the injunction sought for by the defendant against the bank. The defendant contends that the injunction also binds the plaintiff.

[19] However, on the same day the defendant succeeded in obtaining the injunction the said lands were auctioned off to the plaintiff.

[20] In these proceedings the defendant seeks to challenge the validity of the foreclosure proceedings before the land administrator and the order for sale of the said lands. The defendant argues that the order for sale of the said lands is invalid and null and void.

[21] The defendant relies on the following grounds:

[22] Firstly, on the date of the auction of the said lands to the plaintiff, the summary judgment against the defendant had already been set aside by the Kuala Lumpur High Court as the defendant

has disputed that it owes the bank the debt and the defendant has succeeded in raising triable issues. Secondly, there was also the injunction which was granted by the Kuala Lumpur High Court to restrain the acts mentioned earlier. Thirdly, the said lands which were valued in the year 2002 for a total value of RM1,800,000 and separately for RM750,000 and RM1,050,000, respectively, ought to have been auctioned off at a higher reserved price than the one set by the bank and also separately instead of together because the said lands formed the subject matter of two separate charges, as mentioned earlier. Fourthly, the defendant ought to have been allowed by the bank to redeem one of the said lands. Fifthly, the bank ought not to have allowed the said lands to be auctioned off to the plaintiff in order to protect the interest of the defendant. Sixthly, the bank had applied for a previous auction to be set aside, and consequently, the bank's application dated 17 November 2003 for an order for sale is defective and invalid for failure by the bank to comply with the provisions of the NLC. Seventhly, the bank's act in auctioning off the said lands is an attempt to extort money from the defendant when the bank has not yet obtained a judgment against the defendant or proven its claim against the defendant in its Civil Suit GS No. D2-22-158-1998.

[23] Eighthly, the fact that the summary judgment was set aside in that civil suit shows that the defendant had succeeded in raising triable issues which merit a full trial.

[24] Ninthly, the full trial of the civil suit will disclose facts or circumstances which will raise a cause to the contrary against the bank's foreclosure proceedings. Therefore, on the balance of convenience the *status quo* ought to be maintained as the defendant will suffer irreparable damage which cannot be compensated by an award of damages if the said lands are sold to the plaintiff.

[25] In view of the above the defendant has filed an action against the plaintiff and the bank *vide* an originating summons in the Penang High Court. The action which has yet to be given a number by the Penang High Court, seeks, *inter alia*, a declaration that the public auction held on 13 May 2005 and the sale of the said lands to the plaintiff are invalid and null and *void ab initio* (the "declaratory relief".) Therefore, the plaintiff's application for the cancellation and/or removal of the private caveat ought to be dismissed and the *status quo* maintained in order to protect the defendant's interest in the said lands.

[26] Having considered the submissions of and the authorities cited by both the learned counsels the court was of the view that the grounds relied upon by the defendant to resist the plaintiff's application were devoid of any merit. The court was of the view that the plaintiff's application had substantial merits. The court agreed with the submissions of the learned plaintiff counsel that the five issues which he had posed to the court for the court's determination ought to be answered as follows:

1. the plaintiff is an aggrieved person under s. 327(1) of the NLC;
2. the defendant cannot enter a private caveat against the said lands as the defendant does not have a "caveatable interest";
3. the injunction does not bind the plaintiff;
4. the defendant can sue the chargee bank where the reserved price is set very low at the public auction compared to the market value of the said lands;
5. it is not open to the defendant to raise any cause to the contrary in these proceedings as the defendant should have appealed against the order for sale.

[27] The reasons are as follows:

[28] The court was satisfied that the plaintiff is an "aggrieved person" within the meaning of those words in s. 327(1) of the NLC. This is because it cannot be disputed that at a sale by public auction when the hammer falls a contract comes into being. (See *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109). The plaintiff, having successfully bidded at the public auction held on 13 May 2008, having paid the 10% deposit of the auction price of RM1,352,000 and having duly executed the contract of sale, has a right or interest in the land which was derived from a quasi-judicial process through an order for sale granted by the land administrator. (See *Gan Jye v. Yap Hong Chiang* [2002] 3 MLJ 628.) The plaintiff will suffer loss, if the private caveat is not removed. (See *United Malayan Banking Corp Bhd v. Development & Commercial Bank Ltd Bhd* [1983] 1 CLJ 82; [1983] CLJ (Rep) 421) The caveat has wrongfully affected the plaintiff's right and interest in the said lands. (See *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 7 CLJ 353 HC.)

[29] As the successful purchaser at the auction the plaintiff is legally entitled to obtain a loan to pay off the remaining 90% of the auction price in order to complete the contract of sale at the auction whereupon he would be entitled to a certificate of sale of the said lands. The existence of the private caveat would frustrate his prospects of obtaining the loan, completing the sale and purchase of the said lands and it would ultimately impede the registration of the sale of the said lands to the plaintiff. (See *BSN Commercial Bank (Malaysia) Bhd v. Thomas Selvaraj Soosai* [1998] 4 CLJ Supp 97.)

[30] On the other hand on the facts and circumstances as disclosed by the defendant in its affidavit-in-reply and the submissions of its learned counsel the defendant cannot enter a private caveat on its own lands because it has no caveatable interest in the said lands. This is because it has failed to establish to the satisfaction of the court that there exists a set of circumstances over and above that of its status as a registered proprietor. (See *Affin Bank Bhd v. Dato' Mohamed Embong* [2002] 1 CLJ 202.)

[31] The fact that the defendant was successful in its application to set aside the summary judgment in the civil action which the bank had instituted against it to recover the alleged debt, that the action had since been set down for full trial and that it was also successful in obtaining the injunction against the bank and that it had filed an originating summons in the Penang High Court against the bank and the plaintiff seeking the declaratory relief could not be considered as circumstances over and above its status as a registered proprietor which gave rise to a distinct interest in the said lands entitling the defendant to lodge the private caveat.

[32] In the case of *Affin Bank Bhd v. Dato' Mohamed bin Embong*, *supra*, the Nik Hashim J (now FCJ) said, *inter alia*, as follows:

> The pending suit does not clothe the defendant with a caveatable interest in the land. The counterclaim against the plaintiff for loss and damages as a result of the alleged premature recall and cancellation of the loan has no connection with the land although the same was a security of the banking facitilies provided to the plaintiff by way of a third charge as the pending suit, as rightly pointed out by the plaintiff's counsel, is between the plaintiff and the borrower, and whatever loss and damages arising from the premature recall and cancellation of the loan due from the plaintiff is to the borrower and not the defendant.

A Thus, the private caveat lodged by the defendant was not one which had been properly and validly lodged in the first place and as such, I ruled they ought not be allowed to remain any longer. Hence, I ordered the caveat to be removed forthwith with costs.

[33] The injunction which was exhibited as "KKH3" to the B defendant's affidavit-in-reply, encl. (5), is an interim *ex parte* injunction dated 13 May 2005.

[34] It is directed at the bank. Neither the plaintiff nor the land administrator was made a party to the injunction.

C **[35]** There was also no proof that the injunction was obtained and served on the plaintiff and the land administrator before the public auction was carried out the same day. So the injunction could not bind the plaintiff or the land administrator in the auction proceedings. Being an *ex parte* injunction it would automatically D lapse on 3 June 2005 ie, 21 days after the date of its issue by virtue of the provisions of the Rules of the High Court 1980. Thereafter, the learned judge who granted it can grant an ad interim injunction pending the hearing *inter partes* of the application for the *ex parte* injunction. (See *RIH Services (M) Sdn Bhd v.* E *Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83.) However, the defendant has failed to satisfy the court that it had been granted an *ad interim* injunction against the plaintiff and the land administrator pending the hearing of the *inter partes* application. This has proved fatal to the defendant's resistance to the plaintiff's application in F these proceedings which were commenced by the plaintiff against the defendant.

[36] Be that as it may, even if the defendant had been successful in doing all of that the court would still have ruled against the defendant in these proceedings because an injunction being basically G a remedy in equity, it acts only *in personam* and not *in rem*. (See *Labtec Sdn Bhd v. Resilient Construction Sdn Bhd* [1992] 4 CLJ 2147; [1992] 2 CLJ (Rep) 682) The order for sale was granted by the Land Administrator on 4 April 2005 in foreclosure proceedings carried out in accordance with the provisions of s. 263 of the NLC. H The order for sale binds the said lands.

[37] In the case of *Koperasi Serbaguna Cuepacs Tanggungan Bhd v. City Investment Sdn Bhd* [1982] CLJ 428; [1982] CLJ (Rep) 494 100 lots of land were previously protected by private caveats which had been removed. Thereafter, the plaintiffs obtained an injunction I to restrain the defendant from entering into dealings affecting the

100 lots of land. The court held that what the plaintiffs had failed to achieve by caveats, they could not subsequently achieve by injunction based on the same ground. The court also held that if the injunction was a second caveat based on the same ground, it could not have been registered owing to the provisions of s. 329(2) of the NLC. On that ground alone the court held that the balance of convenience was in favour of the defendants and the injunction was discharged.

[38] In the present case what the defendant ought to have done was to appeal against the order for sale granted by the land administrator in accordance with s. 418 of the NLC and to seek to have it set aside by raising a cause to the contrary in its appeal.

[39] Section 263(1) of the NLC expressly requires the land administrator to grant an order for sale unless there is cause to the contrary. The Federal Court in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 has settled the law on what constitutes a cause to the contrary.

[40] The land administrator in foreclosure proceedings has no powers to adjudicate on issues which may ordinarily be heard by a court. He is not a court within the definition of the word as contained in s. 5 of the NLC. Upon being satisfied that the charge is registered, the only question for him to decide is whether there had been a default in the payments provided for. If he was so satisfied, he is obliged to make an order for sale. (See *Wee Huay Fong v. Pentadbir Tanah, Klang & Anor* [2002] 6 CLJ 512 HC)

[41] The appeal period for the filing of an appeal against the order for sale granted by the land administrator has lapsed. Therefore, the defendant's originating summons against the bank and the plaintiff for declaratory relief would also be futile because the Federal Court has decided that where Parliament has by plain and unambiguous language in s. 418 of the NLC enacted a special procedure of enforcing a right and for obtaining a remedy within a time - limit, that time - limit is the foundation of the right given in that section and the party who is seeking relief against the error committed by the relevant authority in the interpretation of a section in the NLC cannot enforce his statutory right by a method *viz* seeking a declaration other than that prescribed by the Code creating it. (See *Development & Commercial Bank Bhd v. Government of Malaysia & Ors* [1989] 2 CLJ 1205; [1989] 1 CLJ (Rep) 486 HC)

[42] Since the defendant did not do that his remedy lies in the institution of a separate action for damages against the bank for having allowed the said lands to be sold at a gross undervalue, assuming that it succeeds in proving its allegation to that effect. (See *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109)

[43] It was futile for the defendant to seek to achieve the same result by obtaining an injunction in a civil action commenced by the bank against the defendant and two others or in the originating summons seeking declaratory relief against the bank and the plaintiff.

[44] In the premises the court allowed the plaintiff's application for the removal of the private caveat with costs.